

**U.S. Department of Labor**

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**Issue Date: 28 June 2004**

**Case No.: 2003-LHC-2728**

**OWCP NO.: 07-142101**

**In the Matter of:**

**STEPHEN C. KUHN,  
Claimant**

**vs.**

**CHEVRON U.S.A., INC.,  
Employer**

**APPEARANCES:**

**TOMMY DULIN, ESQ.,  
On Behalf of the Claimant**

**V. WILLIAM FARRINGTON, JR., ESQ.,  
On Behalf of the Employer**

**BEFORE: RICHARD D. MILLS  
Administrative Law Judge**

**DECISION AND ORDER – AWARDING BENEFITS**

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.*, (the "Act" or "LHWCA"). The claim is brought by Stephen Kuhn, Claimant, against his former employer, Chevron USA, Inc. ("Chevron"), Respondent. Claimant asserts that he suffers from a back condition and other medical conditions for which Chevron is responsible. A hearing was held on April 6, 2004 in Gulfport, Mississippi, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence<sup>1</sup>:

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<sup>1</sup> The following abbreviations will be used in citations to the record: JX – Joint Exhibit; CX – Claimant's Exhibit; RX – Respondent's Exhibit; and TR – Transcript of the proceedings.

- 1) Joint Exhibit 1;
- 2) Claimant's Exhibits Nos. 1-20; and
- 3) Respondent's Exhibits Nos. 1-16.

Upon conclusion of the hearing, the record remained open for the submission of a post-hearing deposition of Christopher Walker, a vocational rehabilitation specialist in this case. This deposition was received timely and admitted as RX-16. The parties also submitted post-hearing briefs, which were timely, received from both parties. This decision is being rendered after giving full consideration to the entire record.

### **STIPULATIONS**

The Court finds sufficient evidence to support the following stipulations<sup>2</sup>:

- 1) This case is governed by the LHWCA.
- 2) Claimant injured his back on March 27, 1996, while on the deck of a vessel at a Chevron facility that was adjacent to navigable waters.
- 3) This injury occurred within the course and scope of Claimant's employment with Employer.
- 4) Employer was advised of Claimant's injury on March 17, 1996.
- 5) A Notice of Controversion was filed on August 6, 1997.
- 6) An Informal Conference was held on April 17, 2003.
- 7) Claimant reached maximum medical improvement in this case on September 3, 2001.

### **ISSUES**

The unresolved issues in these proceedings are:

- (1) Fact of Injury and Causation;
- (2) Nature and Extent of Disability;
- (3) Average Weekly Wage;

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<sup>2</sup> JX-1.

(4) Reasonable and Necessary Medical Benefits; and

(5) Attorney's Fees.

## **SUMMARY OF THE EVIDENCE**

### **I. TESTIMONY**

#### **Stephen Kuhn**

Mr. Kuhn was born in February 1953. TR. 16. He is divorced and currently resides in Moss Point, Mississippi with his 26 year-old daughter. TR. 16-17. Mr. Kuhn graduated high school and thereafter attended Perkinston Junior College and Gulf Coast Junior College, but did not graduate from either institution. TR. 17. After leaving college, Mr. Kuhn worked for International Paper Company, performing laborer's work as well as work in the machine room, wood yard, and beater room. TR. 18. After International Paper Company, Mr. Kuhn worked as an outside machinist at Ingalls for about four years. TR. 18. Mr. Kuhn thereafter worked about six years at Mississippi Chemical Corporation as a millwright. TR. 18-19. Mr. Kuhn next worked for Brown and Root as a machinist, and then Mississippi Power as a maintenance mechanic and welder. TR. 19.

Mr. Kuhn then left Mississippi Power and entered into an apprentice program at Chevron in 1982, ultimately working his way up to the position of refinery mechanic. TR. 19, 21. Mr. Kuhn testified that he worked at the Chevron facility in Pascagoula, Mississippi, which was adjacent to a navigable waterway, Bayou Cassote Ship Terminal. TR. 21. Mr. Kuhn testified that his duties as a refinery mechanic involved maintaining and repairing turbans, gear boxes, pumps, loading arms, and other machinery. TR. 21.

Mr. Kuhn testified that he was injured on March 27, 1996, while attempting to repair the hydraulics of a loading arm. TR. 22-23. Mr. Kuhn testified that he was working on the motor of the loading arm when his repair malfunctioned and he was propelled about ten feet down to the deck of the ship, landing on his backside. TR. 23. Mr. Kuhn testified that he reported this injury to his supervisor, but that he was able to finish his work day. TR. 23. Mr. Kuhn testified that he continued with regular duty for a period after his work injury but that his work capacity lessened as his pain and leg problems worsened. TR. 25. Mr. Kuhn testified that he was earning \$975.00 per week at the time of his work injury, or about \$23 to \$24 dollars per hour. TR. 23.

Mr. Kuhn testified that he ultimately was sent to Dr. John McCloskey for treatment of his work injury. TR. 24. Mr. Kuhn testified that Dr. McCloskey performed surgery on his lower back in March 2000. TR. 25-26. Mr. Kuhn explained that the surgery was necessary because he had become immobilized after his back gave out one morning, causing pain in his lower back and down his left leg to his foot. TR. 25-26.

Mr. Kuhn testified that he continues with constant back, left leg, and left foot pains, despite the surgery and his ongoing pain medication. TR. 27. According to Mr. Kuhn, his left foot is dead and his left leg is numb and gives way with significant movement. TR. 27, 30. Mr. Kuhn testified that his pain is very uncomfortable and that he cannot move around properly, particularly with curbs and steps. TR. 27-28.

Mr. Kuhn testified that he also suffers from diabetes, a condition pre-dating his work injury. TR. 26. Mr. Kuhn has been treated for his diabetic condition by Dr. John Allgood, his general practitioner. TR. 28. According to Mr. Kuhn, his diabetes has become less controlled since his work injury and his diabetes medication has increased since his work injury from one pill per day to six pills per day. TR. 27. Mr. Kuhn testified that Dr. Allgood also treats him for hypertension and chronic obstructive pulmonary disease ("COPD"). TR. 29.

Mr. Kuhn testified that he also has suffered from depression since his work injury. TR. 28. Mr. Kuhn testified that he was treated by Dr. Paul Pyles for depression and has been prescribed depression medication by Dr. Pyles and Dr. Allgood. TR. 28. Mr. Kuhn testified that he has not seen Dr. Pyles since 2002 because of coverage and scheduling problems, but that he would seek treatment again with Dr. Pyles if such treatment is approved by Chevron. TR. 41-42. Mr. Kuhn testified that Chevron has not paid for the medical bills of Drs. Pyles and Allgood. TR. 29.

Mr. Kuhn testified that he has searched for alternative work since his release by Dr. McCloskey. TR. 30-32. Mr. Kuhn testified that his job search began in July 2001 and included the openings suggested by Ronnie Smith and Christopher Walker, vocational rehabilitation specialists in this case. TR. 30-32. Mr. Kuhn testified that he has never gotten any callbacks for his job applications. TR. 32. Mr. Kuhn opined that he is not currently able to maintain a job, because his physical conditions limit his ability to maintain a work schedule. TR. 32.

Mr. Kuhn testified that his daily activities have been limited since his back surgery. TR. 34-35. Mr. Kuhn testified that since his back surgery, his daughter has helped him around the house, including helping him get dressed, particularly in relation to his belt, socks, and shoes, and with getting in and out of the bath. TR. 32-33. Before his daughter moved in with him, Mr. Kuhn lived alone and was helped by his son, who lived about one hundred yards away. TR. 37-38. Mr. Kuhn testified that about one-third of his days are bad days, in which his ability to move is limited and he sometimes is

unable to get out of bed. TR. 32. Mr. Kuhn testified that he owns an automatic transmission truck and is able to drive about ten miles on a good day, but is not able to drive at all on bad days. TR. 18, 42. Mr. Kuhn testified that he takes a large number of medications each day, including Percocet for pain, Zoloft, Effexor, Amitriptyline, inhalers to help with breathing, sleeping medication because he has difficulty sleeping, diabetes medication, and high blood pressure medication. TR. 33-34. Mr. Kuhn testified that his diabetes medication causes him stomach problems and diarrhea. TR. 34.

Mr. Kuhn testified that he had opened a bait camp business, Bayou Heron Live Bait Shop, but has been unable to run the business after his back surgery. TR. 35-37. Mr. Kuhn testified that he has since transferred ownership of the bait camp and its assets to his daughter and that he does not have any involvement in the operation of the bait camp. TR. 35-37. According to Mr. Kuhn, the bait camp has not made any money since his back surgery. TR. 35-37.

## **II. MEDICAL EVIDENCE**

### **1. Testimony and Reports**

#### **John M. Allgood, M.D.**

Dr. Allgood testified by way of deposition on February 20, 2004. RX-14; CX-15. Dr. Allgood testified that he received his medical degree in 1982 from the University Of South Alabama College Of Medicine. RX-14, p. 6. After a three year residency at the University of Alabama in Birmingham, he entered into private practice. RX-14, p. 6. He has been a general practitioner since 1987. RX-14, p. 6. From 1990 to 1996, Dr. Allgood practiced at Gulf Coast Community Hospital. RX-14, p. 8. From January 1997 until the spring of 2000, Dr. Allgood practiced at East Central Medical Center in Hurley, Mississippi. RX-14, p. 8. Since that time, Dr. Allgood has been practicing at the Community Medical Center in Lucedale, Mississippi. RX-14, p. 6. For purposes of his deposition, Dr. Allgood did not have any of Mr. Kuhn's medical records prior to November 2001. RX-14, p. 9.

Dr. Allgood testified that he has been treating Mr. Kuhn since approximately 1990, primarily for acute medical illnesses, such as the flu, stomach problems, lacerations, and the like. RX-14, p. 7. Dr. Allgood testified that he began treating Mr. Kuhn for diabetes and asthma while practicing at East Central Medical Center. RX-14, p. 10. According to Dr. Allgood, Mr. Kuhn notified him of his work injury some time prior to November 2001. RX-14, p. 9.

Dr. Allgood indicated that Mr. Kuhn was seen in November 2001 for chronic back pain and other medical problems, primarily asthma and diabetes. RX-14, p. 9. Dr. Allgood testified that he performed a clinical examination, which was significant only for some wheezing in the chest. RX-14, p. 11. Dr. Allgood testified that the main result of the visit was adjustment of Mr. Kuhn's diabetes medication to control his diabetes. RX-14, p. 10.

Dr. Allgood testified that he next saw Mr. Kuhn in March 2002. RX-14, p. 11. Dr. Allgood testified that he discussed with Mr. Kuhn his back pain, diabetes, and cholesterol and triglyceride levels. RX-14, p. 11. Dr. Allgood indicated that Mr. Kuhn's cholesterol was elevated at 206, with the normal range topping out at 200. RX-14, pp. 11-12. Mr. Kuhn's triglycerides were over 1,100, with the normal being about 165. RX-14, p. 11. Dr. Allgood also spoke with Mr. Kuhn about his treatment with Dr. McCloskey. RX-14, p. 12.

Dr. Allgood again saw Mr. Kuhn in early June 2002, in relation to his diabetes, elevated triglyceride levels, and asthma. RX-14, p. 12. According to Dr. Allgood, Mr. Kuhn did not complain of back pain at that time. RX-14, p. 13. Dr. Allgood prescribed six medications for Mr. Kuhn's various problems, including inhalers, Zoloft for depression, and pain medication. RX-14, pp. 13, 15.

Dr. Allgood next saw Mr. Kuhn in August 2002, for evaluation of his diabetes, chronic back pain, triglyceride problem, and intestinal problems with diarrhea. RX-14, p. 13. Dr. Allgood continued Mr. Kuhn on his medications. RX-14, p. 13.

Dr. Allgood next saw Mr. Kuhn in September 2002, at which time Mr. Kuhn's diabetes was out of control. RX-14, p. 14. Dr. Allgood adjusted Mr. Kuhn's diabetes medication. RX-14, p. 14. Dr. Allgood did not note or discuss any back pain with Mr. Kuhn. RX-14, p. 14. Mr. Kuhn returned one week later, to discuss his diabetes and the effects of the new medication regiment. RX-14, p. 14.

Dr. Allgood next saw Mr. Kuhn on December 17, 2002. RX-14, p. 14. Dr. Allgood and Mr. Kuhn primarily discussed Mr. Kuhn's diabetes, as well as social security disability benefits for which Mr. Kuhn was in the process of applying. RX-14, p. 14.

Dr. Allgood opined on January 9, 2003 that Mr. Kuhn was totally incapacitated and non-employable. RX-14, p. 18. Dr. Allgood indicated that Mr. Kuhn's disability was multifactorial, in consideration of his physical, medical, and psychological disease. RX-14, p. 18.

Dr. Allgood next saw Mr. Kuhn on April 23, 2003, at which time Mr. Kuhn was evaluated primarily for diabetes, high blood pressure, and symptoms of depression. RX-14, p. 15. Mr. Kuhn returned on April 29, 2003, for a re-check of his blood pressure as well as review of some laboratory results. RX-14, p. 15. Dr. Allgood continued Mr. Kuhn on his diabetes, high blood pressure, and depression medications. RX-14, p. 16.

Dr. Allgood next saw Mr. Kuhn on June 26, 2003. RX-14, p. 16. At this time, Mr. Kuhn reported that his left leg had given out about one week earlier, causing him to fall and sustain an abrasion and swelling on his left hand. RX-14, p. 16. Dr. Allgood found that Mr. Kuhn had a healing abrasion. RX-14, p. 16.

Dr. Allgood next saw Mr. Kuhn on September 17, 2003, at which time Dr. Allgood and Mr. Kuhn discussed Mr. Kuhn's back pain, diabetes, and high blood pressure. RX-14, p. 17. Dr. Allgood refilled Mr. Kuhn's prescriptions. RX-14, p. 17. Dr. Allgood last saw Mr. Kuhn on December 18, 2003, when Dr. Allgood evaluated primarily Mr. Kuhn's back pain, depression, and diabetes. RX-14, p. 17.

With respect to Mr. Kuhn's work injury, Dr. Allgood agreed with Dr. McCloskey's restrictions for Mr. Kuhn against work that involves lifting of more than 20 pounds, vertical climbing, overhead work, or does not allow for the ability to change positions frequently, including sitting and walking around. RX-14, p. 19. Dr. Allgood testified that he would defer to Dr. Pyles for the diagnosis and assignment of work restrictions concerning Mr. Kuhn's psychiatric condition. RX-14, pp. 22-23. However, Dr. Allgood opined that Mr. Kuhn was restricted from all employment in relation to his medical conditions as a totality, considering his pain, diabetes, and depression. RX-14, pp. 19, 26. Dr. Allgood indicated that Mr. Kuhn was not able to return to his former employment as a refinery mechanic. RX-14, p. 24.

Dr. Allgood opined that Mr. Kuhn has chronic back pain. RX-14, p. 21. Dr. Allgood opined also that Mr. Kuhn's diabetes mellitus was probably aggravated by his decreased mobility from his work accident. RX-14, p. 24. Dr. Allgood opined that Mr. Kuhn's hypertension was not caused or aggravated by his work injury. RX-14, p. 24.

### **John J. McCloskey, M.D.**

Dr. McCloskey testified by way of deposition on March 19, 2004. RX-15. Dr. McCloskey first saw Mr. Kuhn in October 1996. RX-15, p. 6. Dr. McCloskey indicated that Mr. Kuhn reported injuring his back earlier in 2003, while unhooking hydraulics at Chevron. RX-15, p. 6. Dr. McCloskey indicated that Mr. Kuhn developed persistent, severe left leg pain for the first time following this accident. RX-15, p. 6. According to Dr. McCloskey, Mr. Kuhn also reported that he first injured his back in 1986 when he fell on a test well while working for Chevron. RX-15, p. 6. Dr. McCloskey noted that Mr.

Kuhn reported having problems intermittently since the 1986 injury and was seen by Dr. Enger, with surgery contemplated at one point. RX-15, p. 6.

Based on Dr. McCloskey's recommendation, Mr. Kuhn underwent an MRI scan in November 1996. RX-15, p. 6. Dr. McCloskey testified that the MRI revealed a large ruptured disc at L5-S1 on the left. RX-15, p. 7. Dr. McCloskey opined that Mr. Kuhn had a ruptured disc and left leg pain absent ankle reflex. RX-15, p. 7.

Dr. McCloskey testified that Mr. Kuhn was admitted to Singing River Hospital on March 4, 2000, and underwent surgery there on March 10, 2000. RX-15, p. 8. Dr. McCloskey performed a microdiscectomy on Mr. Kuhn's ruptured disc at L5 on the left. RX-15, p. 8.

On July 27, 2000, Mr. Kuhn underwent another MRI scan, which indicated that Mr. Kuhn had re-herniated a portion of his disc at L5 on the left. RX-15, pp. 8-9; CX-10, pp. 5, 18, 20.

On January 3, 2001, Dr. McCloskey opined that Mr. Kuhn reached maximum medical improvement and had a 15% whole body permanent partial impairment. RX-15, pp. 9, 19; CX-10, p. 13. Dr. McCloskey opined that Mr. Kuhn was permanently limited to light or sedentary work. RX-15, pp. 9, 19; CX-10, p. 13.

On January 13, 2001 and April 2, 2001, Dr. McCloskey opined that Mr. Kuhn should be restricted from work involving lifting of greater than 20 pounds, vertical climbing, or overhead work. CX-10, pp. 9, 11. Dr. McCloskey also indicated that Mr. Kuhn required the ability to frequently change his positions, such as sitting and walking around. CX-10, pp. 9, 11.

Dr. McCloskey last saw Mr. Kuhn on January 29, 2002, at which time Mr. Kuhn was having increased pain spasms and drawing in his left leg. RX-15, pp. 9-10. Dr. McCloskey opined that Mr. Kuhn (1) suffered from post-lumbar laminectomy syndrome, (2) was overweight, (3) suffered from hypertension, (4) suffered from non-insulin dependent diabetes mellitus, (5) heart disease, and (6) COPD. CX-10, p. 2. Dr. McCloskey indicated that Mr. Kuhn was permanently and totally disabled. RX-15, pp. 14-15; CX-10, p. 3. Dr. McCloskey opined that no work existed for which Mr. Kuhn was physically and educationally capable of performing. CX-10, p. 3. Dr. McCloskey indicated that Mr. Kuhn could only sit or stand for a short time, was very limited in his walking ability, and was not able to do any lifting. CX-10, p. 3.

Considering only his work injury, Dr. McCloskey indicated on June 10, 2003, that Mr. Kuhn was limited to sedentary work. CX-10, p. 1. Dr. McCloskey approved some alternative positions for Mr. Kuhn based only on Mr. Kuhn's back condition from his work injury, without consideration of Mr. Kuhn's other medical problems. RX-15, p. 19. Dr. McCloskey opined that Mr. Kuhn could work as a cashier if the job did not involve



any lifting, a security guard if the position did not require much walking, a clerk at Video City, and a dispatcher for the City of Gulfport, a phone solicitor, a booth cashier, or a customer service representative. CX-10, p. 1. Dr. McCloskey indicated that Mr. Kuhn was not able to work as a parts and service cashier at Pat Peck Nissan because the position may have involved bending, lifting, working overhead, and carrying items. RX-15, p. 11; CX-10, p. 1. Dr. McCloskey opined that Mr. Kuhn could not work as a delivery driver because a steady dose of driving and getting in and out of the vehicle would be problematic for someone with a back problem. RX-15, p. 11; CX-10, p. 1. Dr. McCloskey also opined that Mr. Kuhn could not work as a soft count clerk because of his back problems. RX-15, pp. 11-12; CX-10, p. 1. Dr. McCloskey opined that Mr. Kuhn could not work at jobs involving lifting or bending, but might be able to work in positions that enabled him to sit and move around and required only simple mechanical tasks, such as taking money from a customer. RX-15, p. 13. Dr. McCloskey opined that Mr. Kuhn could not return to his work as a refinery mechanic at Chevron. RX-15, p. 13.

Considering Mr. Kuhn's medical conditions as a totality, including his diabetes and depression, Dr. McCloskey testified that there is no doubt Mr. Kuhn is permanently and totally disabled. RX-15, pp. 15, 17-19. Dr. McCloskey testified that he would defer to Dr. Pyles regarding whether Mr. Kuhn is able to work from a psychiatric viewpoint. RX-15, p. 16.

## **2. Reports**

### **Terry Smith, M.D.**

Dr. Smith first saw Mr. Kuhn on October 17, 2000, for a second opinion regarding Mr. Kuhn's need for a repeat discectomy. CX-12, pp. 4-5. Dr. Smith conducted a physical examination and reviewed Mr. Kuhn's July 2000 MRI. CX-12, p. 4. Dr. Smith concurred with the recommendation for a repeat discectomy. CX-12, p. 5.

Mr. Kuhn was evaluated by Dr. Smith on July 23, 2002, regarding Mr. Kuhn's work injury. CX-12, p. 2. Dr. Smith opined that Mr. Kuhn had a whole body impairment of 8%. CX-12, p. 3.

### **Edward Schnitzer, M.D.**

Dr. Schnitzer evaluated Mr. Kuhn on August 1, 2000, for persistent low back and left leg pain, status post lumbar disc surgery. RX-2, p. 1. Dr. Schnitzer took Mr. Kuhn's medical history and performed a physical examination. RX-2, pp. 1-2. Dr. Schnitzer opined that Mr. Kuhn suffered from (1) post lumbar laminectomy syndrome and (2) ongoing radicular back pain. RX-2, p. 3. Dr. Schnitzer opined that Mr. Kuhn, in light of all his medical conditions, would be capable of sedentary or light duty at most. RX-2, p. 3.

## **Paul I. Pyles, M.D.**

Dr. Pyles conducted a psychiatric evaluation of Mr. Kuhn on August 29, 2001. CX-14, p. 14. Dr. Pyles indicated that Mr. Kuhn's physical complaints were chronic pain, decreased sleep, and inability to work, jerks, spasms, decreased memory, and inability to drive due to back pain. CX-14, p. 14. Dr. Pyles indicated that Mr. Kuhn suffered from severe depression and was unable to work from a medical standpoint. CX-14, p. 15. According to Dr. Pyles, Mr. Kuhn had significant social and occupational impairment from a medical standpoint. CX-14, p. 15.

An MRI of Mr. Kuhn's brain was performed on December 13, 2001. CX-14, p. 7. The MRI was normal and showed only a probable mucous retention cyst right maxillary sinus. CX-14, p. 7.

## **Ocean Springs Hospital Rehabilitation Center**

On March 8, 2001, Mr. Kuhn underwent a Physical Work Performance Evaluation with Karen Davis, P.T., at Ocean Springs Hospital Rehabilitation Center. RX-4, p. 1. The evaluation results indicated that Mr. Kuhn was capable of performing sedentary level work, but was not capable of sustaining such work level for an 8-hour day. RX-4, p. 1. The report noted that Mr. Kuhn demonstrated self-limiting participation by stopping on 12 out of 21 tasks. RX-4, p. 1. The report indicated that Mr. Kuhn was not capable of performing his former work at Chevron. RX-4, p. 3.

Mr. Kuhn underwent a Functional Capacity Evaluation ("FCE") with Douglas Bates at Ocean Springs Hospital Rehabilitation Center on October 1, 2002. RX-8, p. 1. The FCE indicated that Mr. Kuhn was capable of light work that entailed occasional sitting, standing, elevated work, lowered work, and reclining reach, but no kneeling, squatting, or lowered work while sitting. RX-8, p. 1. The report noted that Mr. Kuhn did not give a maximum effort and self-limited in 38% of the tasks. RX-8, p. 1.

## **III. VOCATIONAL EVIDENCE**

### **1. Testimony and Reports**

#### **Christopher Walker**

Mr. Walker testified by way of deposition on May 13, 2004. RX-16. Mr. Walker was employed by the Mississippi Department of Rehabilitation Services, beginning in 1998. RX-16, p. 7. Mr. Walker also worked for Crawford and Company as a vocational rehabilitation counselor for about one year, from March 2003 until the spring of 2004. RX-16, pp. 7-8. Mr. Walker testified that he is certified as a vocational rehabilitation counselor and is certified in assisted technology practioning (ATP). RX-16, p. 9.

Mr. Walker interviewed Mr. Kuhn on June 23, 2003, about Mr. Kuhn's work injury, medical history, educational background, employment history, and daily activities. RX-9, pp. 1-5; RX-16, pp. 10-11. Mr. Walker indicated that he reviewed the depositions of Mr. Kuhn, Dr. Allgood, and Dr. McCloskey, as well as the reports of Dr. Pyles, Dr. Smith, and the FCEs from Karen Davis and Douglas Bates. RX-16, pp. 11-12.

Mr. Walker testified that he conducted three labor market surveys, on August 10, 2003, on September 3, 2003, and on September 23, 2003. RX-10; RX-11; RX-12; RX-16, p. 12. Mr. Walker testified that in August 2003, he identified three gas station cashier positions: a full-time position at a Chevron gas station in Gautier, Mississippi, a part-time position at an Exxon gas station in Pascagoula, Mississippi, and a full time position at a Chevron in Moss Point, Mississippi. RX-10, pp. 1-3; RX-16, p. 13. According to Mr. Walker, each of these positions was light duty and paid \$6.00 per hour. RX-10, pp. 1-3; RX-16, p. 13. Mr. Walker testified that these positions were within the restrictions outlined in Mr. Kuhn's FCE. RX-16, p. 13. Mr. Walker also identified a cashier position at McDonald's Restaurant that paid \$5.25 per hour and a telephone operator position with Kwik Kare Inc. that paid \$6.50 per hour. RX-10, pp. 3-4.

In his September 3, 2003 labor market survey, Mr. Walker identified a full-time PBX operator position at Singing River Hospital in Ocean Springs, Mississippi. RX-11, p. 1; RX-16, p. 14. The position was sedentary and paid \$7.46 to \$9.72 per hour. RX-11, p. 1; RX-16, p. 14. Mr. Walker next identified three file clerk position openings involving Health Information Management Systems, one at Singing River Hospital in Ocean Springs, MS and two at Singing River Hospital in Pascagoula, MS. RX-11, pp. 2-3; RX-16, p. 14. The positions were light duty and paid \$6.34 to \$8.27 per hour. RX-11, pp. 2-3; RX-16, p. 14. These positions were within the restrictions outlined by Mr. Walker's FCE results. RX-16, p. 14.

In his last labor market survey, Mr. Walker identified two sales associates' positions at Radio Shack, in D'Iberville, Mississippi and Pascagoula, Mississippi, respectively. RX-12, pp. 1-2; RX-16, p. 15. One of the positions was full-time and the other was part-time, but both paid \$5.15 per hour or commission, whichever total was higher. RX-12, pp. 1-2; RX-16, p. 15.

Mr. Walker opined that Mr. Kuhn would not be able to return to his former work at Chevron, but that Mr. Kuhn was able to work in some capacity. RX-16, pp. 15-16, 18. Mr. Walker acknowledged that Dr. McCloskey indicated on January 29, 2002 that Mr. Kuhn was permanently and totally disabled. RX-16, p. 16. Mr. Walker also acknowledged that Dr. Pyles opined that Mr. Kuhn was permanently and totally disabled from all employment, from a psychiatric viewpoint. RX-16, p. 17. Mr. Walker also acknowledged that Dr. Allgood opined that Mr. Kuhn was permanently and totally disabled. RX-16, pp. 17-18.

Mr. Walker testified that he would concur with the opinions of Dr. McCloskey, Allgood, and Pyles in that Mr. Kuhn probably would not be able to return to work, in consideration of Mr. Kuhn's medical conditions as a whole. RX-16, p. 23.

## **2. Reports**

### **Ronnie Smith**

Mr. Smith conducted a vocational rehabilitation assessment of Mr. Kuhn on July 12, 2001, on behalf of Crawford and Company. RX-7. Mr. Smith indicated that Mr. Kuhn would not be able to return to his work as a refinery mechanic at Chevron, based on the work restrictions outlined by Dr. McCloskey. RX-7, p. 4. However, Mr. Smith identified 11 positions that he opined were suitable alternative employment for Mr. Kuhn. RX-6, pp. 1-2; RX-7, pp. 4-5. Mr. Smith identified: (1) a parts and service cashier position at Pat Peck Nissan; (2) a security guard position at Marine Life; (3) a delivery driver position at Clark West Auto Parts; (4) a clerk position at Video City USA; (5) a dispatcher position with the City of Gulfport; (6) a soft count clerk at Treasure Bay Casino; (7) a soft count clerk at Grand Casino; (8) a phone solicitor position with the Police Benevolent Association; (9) a booth cashier position at a BP gas station; (10) a customer service representative position with Cingular Wireless; and (11) a cashier position with EZ Check Cashing. RX-6, pp. 1-2; RX-7, pp. 4-5.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed. 2d 221 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221.

## **JURISDICTION AND COVERAGE**

This dispute is before the Court pursuant to 33 U.S.C. § 919(d) and 5 U.S.C. § 554, by way of 20 C.F.R. §§ 702.331 and 702.332. See Maine v. Brady-Hamilton Stevedore Co., 18 BRBS 129, 131 (1986).

In order to demonstrate coverage under the LHWCA, a worker must satisfy both a situs and status test. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 415-16, 105 S.Ct. 1421, 1423, 84 L.Ed. 2d 406 (1985); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 73, 100 S.Ct. 328, 332, 62 L.Ed. 2d 225 (1979). The situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. Bienvenu v. Texaco, Inc., 164 F.3d 901, 904 (5th Cir. 1999); P.C. Pfeiffer Co., 444 U.S. at 78, 100 S.Ct. at 334-35, 62 L.Ed. 2d 225.

The situs test originates from § 3(a) of the LHWCA, 33 U.S.C. § 903(a), and the status test originates from § 2(3), 33 U.S.C. § 902(3). See P.C. Pfeiffer Co., 444 U.S. at 73-74, 100 S.Ct. at 332, 62 L.Ed. 2d 225. With respect to the situs requirement, § 3(a) states that the LHWCA provides compensation for a worker whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Id. With respect to the status requirement, § 2(3) defines an "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker...." Id. To be eligible for compensation, a person must be an employee as defined by § 2(3) who sustains an injury on the situs defined by § 3(a). Id.

In this case, the parties do not contest jurisdiction under the Act. JX-1. Mr. Kuhn worked as a refinery mechanic for Chevron, performing maintenance and repair work on machinery at the Chevron facility in Pascagoula, Mississippi, which is adjacent to a navigable waterway. TR. 21. In addition, Mr. Kuhn's work injury occurred while he was repairing a loading arm at the Chevron facility. TR. 22-23. Therefore, the Court finds that jurisdiction under the Act is proper for this case.

### **FACT OF INJURY AND CAUSATION**

The claimant has the burden of establishing a prima facie case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318 (1982). Once the claimant establishes these two elements of his *prima facie* case, Section 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). Furthermore, when an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability and for medical expenses due to both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. See Atlantic Marine v.

Bruce, 661 F.2d 898, 901, 14 BRBS 63, 65 (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 456-57 (9th Cir. 1954); Mijangos v. Avondale Shipyards, 19 BRBS 15, 17 (1986). In addition, if a claimant's employment aggravates a non-work-related, underlying disease or condition so as to produce incapacitating symptoms, the resulting disability is compensable. See Gardner v. Bath Iron Works Corp., 11 BRBS 556 (1979), aff'd sub nom. Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981).

The parties have stipulated that Mr. Kuhn's back condition is employment-related. JX-1. Based on the testimony of Mr. Kuhn, as well as the testimony and reports of Dr. McCloskey, the Court finds that there is sufficient evidence to support this stipulation. TR. 22-27; RX-15; CX-10. At issue is whether Mr. Kuhn's other medical conditions are related to his work injury, such that Chevron would be liable for the disability and medical expenses arising from those conditions. The Court finds that Mr. Kuhn has established a *prima facie* case of compensability regarding his diabetic and psychiatric conditions and is entitled to the §20(a) presumption regarding those two conditions.

First, Mr. Kuhn testified that although he suffered from diabetes prior to his work injury, his diabetes has been more out-of-control since his work injury. TR. 27. Mr. Kuhn testified that his diabetes medication has increased since his work injury from one pill per day to six pills per day. TR. 27. Dr. Allgood's testimony corroborated Mr. Kuhn's testimony. Dr. Allgood opined that Mr. Kuhn's diabetes mellitus was probably aggravated by Mr. Kuhn's decreased mobility due to his work injury. RX-14, p. 24. Second, Mr. Kuhn testified that he suffers from depression as a result of his work injury. TR. 28. Mr. Kuhn was treated by Dr. Pyles for complaints of chronic pain, decreased sleep, jerks, spasms, decreased memory, and an inability to work and drive due to back pain. CX-14, p. 14. Dr. Pyles opined that Mr. Kuhn suffered from severe depression and had significant social and occupational impairment from a medical standpoint. CX-14, p. 15. Dr. Allgood continues to prescribe depression medication for Mr. Kuhn. RX-14, pp. 16-17. Based on the foregoing, the Court finds that Mr. Kuhn has established that he suffers from diabetes and depression and that a work incident occurred that could have caused or aggravated these conditions. Therefore, Mr. Kuhn is entitled to the § 20(a) presumption in relation to these conditions.

Although Mr. Kuhn suffers or has suffered from several other medical conditions, including hypertension, elevated triglyceride levels, heart disease, and asthma or COPD, there is no evidence in the record establishing that these conditions could have been caused or aggravated by his work accident. TR. 29; RX-14; CX-10. Specifically, Dr. Allgood opined that Mr. Kuhn's hypertension was not caused or aggravated by his work injury. RX-14, p. 24. Therefore, the Court finds that Mr. Kuhn has not established a *prima facie* case of compensability regarding these other medical conditions.

After the Section 20(a) presumption has been established, the employer must introduce “substantial evidence” to rebut the presumption of compensability and show that the claim is not one “arising out of or in the course of employment.” 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

The Court finds that Respondent has not presented sufficient evidence in this case to rebut the §20(a) presumption regarding Mr. Kuhn’s diabetic and psychiatric conditions. Respondent has not presented any evidence suggesting that Mr. Kuhn either does not suffer from diabetes or that Dr. Allgood’s opinion is incorrect regarding the aggravation of Mr. Kuhn’s diabetic condition by his work injury. Likewise, there is no substantial evidence in the record indicating that Mr. Kuhn does not suffer from a psychiatric condition or that his psychiatric condition is unrelated to his work injury. Because Respondent has failed to rebut the §20(a) presumption regarding Mr. Kuhn’s diabetic and psychiatric conditions, the Court finds that Mr. Kuhn’s diabetic and psychiatric conditions are related to his March 27, 1996 work injury.

### **NATURE AND EXTENT OF DISABILITY**

Disability under the Act means, “incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment.” 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage-earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant’s disability is permanent in nature if he has any

residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5 (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum medical benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

The parties in this case have stipulated that Mr. Kuhn's disability reached maximum medical improvement on September 3, 2001. JX-1. Dr. McCloskey opined that Mr. Kuhn's back condition reached maximum medical improvement on January 3, 2001. RX-15, p. 9; CX-10, p. 13. The Court finds that September 3, 2001 is a reasonable approximation of the date that Mr. Kuhn's diabetic and psychiatric conditions, as well as his back condition, reached the point of maximum medical improvement. Therefore, the parties' stipulation is accepted by the Court.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3rd Cir. 1979). For the job opportunities to be realistic, however, the employer must establish the precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).



In this case, Mr. Kuhn is not capable of returning to his former employment as a refinery mechanic. RX-4, p. 3; RX-14, p. 24; RX-15, p. 13; RX-16, p. 18; CX-14, p. 15. Therefore, the Court finds that Mr. Kuhn has established a *prima facie* case of total disability. In addition, the Court finds that Respondent has not established the existence of suitable alternative employment. Although Dr. McCloskey opined that, considering only Mr. Kuhn's back condition, Mr. Kuhn was capable of performing sedentary work with restrictions, Dr. McCloskey indicated that there was no doubt Mr. Kuhn was totally disabled in consideration of his medical conditions as a whole. RX-15, pp. 15, 17-19; CX-10, p. 1. Dr. Allgood also opined that Mr. Kuhn was totally disabled in light of his medical conditions as a whole. RX-14, pp. 19, 26. Likewise, Dr. Pyles indicated that Mr. Kuhn was unable to work from a psychiatric viewpoint. CX-14, p. 15. Even Respondent's vocational rehabilitation expert, Christopher Walker, agreed that Mr. Kuhn was totally disabled when considering his medical conditions as a totality. RX-16, p. 23.

The positions identified as suitable alternative employment in this case were identified in light of Mr. Kuhn's physical restrictions from his FCE and did take into account the medical opinions in this case regarding Mr. Kuhn's abilities based on his physical condition as a whole. RX-7, p. 4; RX-10; RX-11; RX-12. A finding that suitable alternative employment exists in this case would be inconsistent with the opinions Mr. Walker and Drs. McCloskey, Allgood, and Pyles. Because the positions identified as suitable alternative employment in this case were identified based on physical restrictions that did not take into account Mr. Kuhn's physical condition as a whole, including his diabetic and psychiatric conditions, the Court finds that the evidence of suitable alternative employment in this case is faulty and insufficient to meet Respondent's burden. Therefore, the Court finds that Mr. Kuhn is totally disabled. The parties stipulated that Mr. Kuhn's disability began on October 29, 1996, and therefore Respondent is liable for compensation benefits beginning October 29, 1996. JX-1.

### **AVERAGE WEEKLY WAGE**

In traumatic injury cases, such as Mr. Kuhn's case, an employee's average weekly wage is determined as of the time of injury for which compensation is claimed, and not the date of the claimant's discovery of his disability. See Hall v. Consolidated Employment Systems, Inc., 139 F.3d 1025, 32 BRBS 91, 95-96 (CRT) (5th Cir. 1998); Merrill v. Todd Pac. Shipyards Corp., 25 BRBS 140, 149 (1991). Section 10 of the Act, 33 U.S.C. § 10, sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) in order to arrive at an average weekly wage. See Johnson v. Newport News Shipbuilding and Dry Dock Co., 25 BRBS 340 (1992). The determination of an employee's annual earnings must be based on substantial evidence. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991).

Section 10(a) applies when an employee has worked in similar employment for substantially the whole of the year. See 33 U.S.C. § 910(a). The § 10(a) formula requires evidence from which an average daily wage can be determined. Taylor v. Smith & Kelly Co., 14 BRBS 489, 494-95 (1981). Where there is no such evidence, § 10(a) cannot be utilized. Taylor, 14 BRBS at 495; Todd Shipyards Corp. v. Director, OWCP, 545 F.2d 1176, 1179, 5 BRBS 23, 26 (9th Cir. 1976). In this case, there is no evidence in the record as to the number of days Mr. Kuhn actually worked during the measuring year. Without such information, it would be impossible to calculate an average daily wage. Therefore, the Court finds that § 10(a) is inapplicable to this case.

Because Section 10(a) is not applicable, the Court will look to §10(b). Section 10(b) calculates the average weekly wage based on similarly situated employees and applies when the injured employee did not work for substantially the whole of the year under § 10(a). See 33 U.S.C. § 910(b). Because no evidence was presented concerning the wages of a similarly situated employee, the Court finds that §10(b) is also inapplicable to this case.

When both Sections 10(a) and (b) are inapplicable, the calculation of average weekly wage defaults to §10(c), which allows the Court to calculate a claimant's average weekly wage in a manner that reflects a fair and reasonable approximation of the claimant's annual wage earning capacity at the time of his work injury. See 33 U.S.C. §910(c). The Court finds that Mr. Kuhn's annual wage-earning capacity is best represented by his total earnings for the measuring year preceding the date of his work injury, March 27, 1996. From the pay period ending April 2, 1995 through the pay period ending March 26, 1996, Mr. Kuhn's total wages were \$48,616.09. CX-19, pp. 1-4. Dividing \$48,616.09 by 52 weeks, pursuant to §10(d), yields an average weekly wage of \$934.92. The Court finds that this figure fairly represents a calculation of Mr. Clarks' average weekly wage at the time of his work injury and is acceptable under §10(c), a section under which the Court has wide discretion.

## **REASONABLE AND NECESSARY MEDICAL EXPENSES**

Section 7(a) of the Act provides that:

- (a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. §907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A

claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980). An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; see also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983).

Because Mr. Kuhn has established that he suffers from a back condition related to his former employment with Chevron, Chevron is responsible for all past and future medical expenses arising from Mr. Kuhn's back condition. In addition, Mr. Kuhn has demonstrated that his diabetic condition has been aggravated by his work injury, and Chevron is therefore also responsible for the medical expenses arising from Mr. Kuhn's diabetic condition and any side effects of the medication for that condition. Chevron is responsible for Mr. Kuhn's diabetic condition beginning after Mr. Kuhn's work injury on March 27, 1996. Lastly, Mr. Kuhn has shown that he suffers from depression related to his work injury, and Chevron is therefore also responsible for the medical expenses stemming from Mr. Kuhn's depression, including treatment with Dr. Pyles or another psychiatrist.

Accordingly,

## ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

- 1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from October 29, 1996 until September 3, 2001, based on an average weekly wage of \$934.92.
- 2) Employer/Carrier shall pay to Claimant compensation for permanent total disability benefits from September 4, 2001 and continuing, based on an average weekly wage of \$934.92. Such compensation shall be adjusted annually for cost of living increases pursuant to Section 10(f) of the Act.

- 3) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this Decision and Order filed with the District Director. See 28 U.S.C. § 1961.
- 4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.
- 5) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary past and future medical expenses, with interest in accordance with 28 U.S.C. §1961, which are the result of Claimant's work-related back, diabetic, and psychiatric conditions.
- 6) Claimant's counsel shall have thirty (30) days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

**So ORDERED.**

**A**

**RICHARD D. MILLS**  
Administrative Law Judge